

1
2
3
4 UNITED STATES DISTRICT COURT
5 DISTRICT OF NEVADA

6 * * *

7 UNITED STATES OF AMERICA,

8 Plaintiff,

Case No. 2:19-cr-00206-KJD-VCF

9 v.

10 KEVIN LAY, SR.,

11 Defendant.

ORDER

12 Before the Court is an Emergency Motion for Revocation of Magistrate Judge's Release
13 under 18 U.S.C. § 3145(a) filed by the United States (#14). Defendant Kevin Lay, Sr. has
14 responded in opposition.

15 **I. Background**

16 **A. Factual Background**

17 Kevin Lay, Sr. is charged by indictment with one count of felon in possession of a
18 firearm under 18 U.S.C. §§ 922(g)(1) and 924(a)(2). The indictment stems from a shooting
19 outside the Boulevard Mall in April of 2019. Video surveillance footage from the night of the
20 incident captured a man wearing red pants, a red, white, and blue shirt, and a red hat standing in
21 a parking lot outside of the Boulevard Mall parking garage.¹ The government claims that the
22 man in the red pants and red, white, and blue shirt is Lay. The video shows Lay involved in a
23 verbal altercation with an unknown person who is standing off-screen inside the garage.
24 Throughout the footage, Lay is being restrained by another man but can be seen gesturing toward
25 the unseen person in the garage. The video then appears to show gunfire coming from inside the
26 garage and presumably aimed at Lay or his son who was also standing in the parking lot near
27

28 ¹ The government manually filed the DVD footage on August 21, 2019, and the Court has viewed the surveillance video. See Not. Manual Filing, ECF No. 15.

1 Lay. Lay and his son returned fire, each firing multiple rounds into the parking garage while they
2 attempted to find cover behind cars in the parking lot. The men then fled the scene.

3 The Las Vegas Metropolitan Police Department responded to the Boulevard Mall
4 shootout and opened an investigation. That investigation led them to Lay. Police obtained both
5 an arrest warrant for Lay and search warrant for Lay's residence. During the search, police
6 recovered clothes similar to the clothes worn by the man shown in the security video (red pants,
7 a red, white, and blue shirt, and red hat) and two separate Glock .40 caliber handguns. Govt.'s
8 Mot. to Revoke 4–5, EFC No. 14. According to the government, police discovered the first
9 firearm in a safe that also held Lay's personal identification like his passport, social security
10 card, and driver license. Id. at 4–5. Police found the second firearm in the same room they found
11 the clothing. Id. at 5. Police compared the shell casings from the Boulevard Mall shooting and
12 found them to match the .40 caliber Glock handgun they found in Lay's home. Id.

13 **B. Procedural Background**

14 The grand jury returned an indictment against Lay on August 13, 2019, and police
15 arrested Lay six days later. See Indictment, ECF No. 1, Arrest Warrant, ECF No. 12. Lay was
16 scheduled to appear before a magistrate judge for a detention hearing on August 19, 2019. That
17 hearing was continued, however, when the government attempted to publish the video
18 surveillance footage without first disclosing the video to Lay. The government produced the
19 video to the defense, and Lay's detention hearing proceeded as planned on August 20, 2019.

20 Pretrial Services performed its initial investigation into Lay's criminal and personal
21 history and recommended that Lay be denied bail. Although Pretrial Services determined that
22 Lay was not a flight risk, it believed that no condition or combination of conditions could
23 reasonably assure the public's safety if Lay were released pending trial. Pretrial Services based
24 its recommendation on Lay's criminal history, which showed multiple arrests, charges, and
25 convictions culminating with a 1992 conviction for murder with a deadly weapon, which Pretrial
26 Services believed to be gang related. Lay's conviction was vacated by the Nevada Supreme
27 Court in 2003 due to Brady violations. Mot. to Revoke at 7. Lay would eventually enter an
28 Alford plea and accept a time-served sentence. Lay's Alford plea and felony conviction prohibit

1 Lay from owning or possessing a firearm or ammunition. Id.

2 Given Lay’s criminal history, his alleged gang connections, the nature of his current
3 offense, and his propensity to continue to violate the law, Pretrial Services recommended that
4 Lay be denied bail. Over the recommendation of Pretrial Services, Magistrate Judge Koppe
5 ordered Lay released on his own recognizance. Magistrate Judge Koppe admitted that she had
6 serious concerns about Lay’s willingness to comply with the conditions of pretrial release but
7 found that a strict combination of conditions could provide the requisite protection to the
8 community. The government immediately moved to stay the release order, which was granted.
9 The government timely filed its emergency motion to revoke the magistrate judge’s release
10 decision under 18 U.S.C. § 3145(a), which allows the government to seek review by a “judge of
11 a court having original jurisdiction over the offense.” 18 U.S.C. § 3145(a). Lay promptly
12 opposed the motion.

13 **II. Legal Standard**

14 The Court reviews a magistrate judge’s order of release de novo. See United States v.
15 Koenig, 912 F.2d 1190, 1192–93 (9th Cir. 1990). The high standard imposed by de novo review
16 is consistent with the goals of the Bail Reform Act, which envisioned a “more plenary” review
17 process at the district level than at the appellate court. Id. at 1192. While the Court need not
18 “start over” or “proceed as if the magistrate [judge’s] decision and findings [do] not exist,” it
19 must review the facts and arguments without deference to the magistrate judge’s decision. Id.;
20 see also id. at 1191 citing United States v. Thibodeaux, 663 F.2d 520, 522 (5th Cir. 1981)
21 (“[district court] is not constrained to look for abuse of discretion or to defer to the judgment of
22 the prior judicial officer”). To that end, the Court may hold evidentiary hearings or order
23 additional briefing before rendering a decision. Id. at 1193; United States v. Delker, 757 F.2d
24 1390, 1394 (9th Cir. 1985). Alternatively, the Court may decide the motion without a hearing.
25 See LR 78-1 (district court may decide “all motions . . . with or without a hearing”).

26 **III. Analysis**

27 The Bail Reform Act allows pretrial release unless the Court finds “that no condition or
28 combination of conditions will reasonably assure the appearance of the person as required and

1 the safety of any other person and the community.” 18 U.S.C. § 3142(e). Section 3142(e) is
2 concerned with two things: the defendant’s appearance at later court dates and the danger a
3 released defendant poses to others. As to a defendant’s risk of flight, the government must prove
4 by a preponderance of the evidence that the defendant will not appear as required. United States
5 v. Motamedi, 767 F.2d 1403, 1406 (9th Cir. 1985). As for a defendant’s danger to the
6 community, the government faces a higher burden. The government must show by clear and
7 convincing evidence that no pretrial conditions could reasonably assure the public’s safety. 18
8 U.S.C. § 3142(f)(2)(B); Motamedi, 767 F.2d at 1406. Neither the government nor Pretrial
9 Services believe Lay to be a flight risk. Accordingly, the Court limits its analysis to whether the
10 government has shown by clear and convincing evidence that no pretrial conditions could
11 reasonably assure the public’s safety if Lay were released pending trial.

12 The Bail Reform Act requires the least restrictive conditions possible to promote
13 compliance with the Court’s orders and ensure the safety of the community. See 18 U.S.C.
14 § 3142(c)(2); United States v. Gebro, 948 F.2d 1118, 1121 (9th Cir. 1991). To determine
15 whether conditions would reasonably ensure the public’s safety, § 3142(g) provides four factors
16 to consider: (1) the nature and circumstances of the charged offense; (2) the weight of the
17 evidence against the defendant; (3) the history and characteristics of the defendant, including the
18 person’s character and criminal history; and (4) the nature and seriousness of the danger to the
19 community posed by the defendant’s release. 18 U.S.C. § 3142(g)(1)–(4). If the government
20 demonstrates by clear and convincing evidence the factors weigh against pretrial release, the
21 Court will deny bail.

22 **A. The Seriousness of Lay’s Charged Offense**

23 The parties contest what the nature of Lay’s charged offense actually is. Lay urges the
24 Court to confine its analysis here to what is charged in the indictment, namely, one count of a
25 felon in possession of a firearm. He argues that the Court cannot consider his alleged
26 involvement in the Boulevard Mall incident because he is not being charged² for it. Resp. to

27
28 ² The State of Nevada initially charged Lay with assault with a deadly weapon in connection with the Boulevard Mall shootout. The State dropped the charges when it could not locate or persuade a victim to press charges. Mot. to Revoke at 6.

1 Moto to Revoke 6, ECF No. 16. Lay concludes that the Court should isolate its bail evaluation to
2 the two weapons found in his home, making the Boulevard Mall incident irrelevant.

3 The government counters that the Court can and should consider Lay's actions leading up to
4 police seizing the firearms from Lay's home, including the Boulevard Mall incident. Mot. to
5 Revoke 3, ECF No. 14. The government argues that Lay's apparent decision to carry a loaded
6 weapon into a crowded restaurant and bar are evidence that he would not comply with pretrial-
7 release conditions.

8 The Court agrees with the government that it is appropriate to consider Lay's actions
9 leading up to and during the Boulevard Mall incident to determine whether pretrial-release
10 conditions would reasonably ensure the public's safety. In reality, the charges against Lay are not
11 as pedestrian as Lay would have the Court believe. Frankly, this is not a case of police finding a
12 firearm in the home of a felon. Lay appears to have made the conscious decision to take the
13 weapon from his home to a crowded public place despite not being legally allowed to own or
14 possess the weapon. Further, even though police ultimately seized the firearms in Lay's home
15 and subsequently charged Lay for their possession, the charges against Lay would include his
16 possession of the firearms the night of the Boulevard Mall incident. Lay's argument that he only
17 discharged the weapon in self-defense does not minimize his decision to possess a firearm as an
18 ex-felon. Lay brandished the weapon long before the first shots were fired. He had already drawn
19 the weapon while a third-party attempted to defuse the situation.

20 The Court finds it appropriate to consider the entirety of Lay's alleged behavior,
21 including the Boulevard Mall incident, because it is evidence of Lay's unwillingness to comply
22 with the conditions of his pretrial release. Accordingly, the nature of Lay's charges weighs
23 against pretrial release.

24 **B. The Weight of the Evidence Against Lay**

25 This factor is the least important of the four § 3142(g) factors. Section 3142(g) requires
26 the Court to consider the weight of the evidence against a pretrial defendant but cautions the
27 Court against overweighting this one factor. The risk in considering the weight of the evidence at
28 this stage is two-fold. First, the Court reviews the § 3142(g) factors at the very beginning of the

1 prosecution. There has been little investigation or discovery performed, and the relative facts are
2 still unsettled. Second, in evaluating the evidence at this stage, the Court risks making a
3 preliminary determination of guilt that could lead to the Court imposing punishment in the form
4 of pretrial detention. Motamedi, 767 F.2d at 1408. Nevertheless, the Court must still evaluate the
5 weight of the evidence against Lay and finds that it weighs against pretrial release.

6 The government provided footage from a security camera at the Boulevard Mall that
7 captured two people firing shots at an unknown shooter concealed within a parking garage. The
8 government argues that Lay is one of the shooters firing into the parking garage. The government
9 bases its identification on the distinct clothing Lay allegedly wore that evening: red pants, a red,
10 white, and blue short-sleeved FILA shirt, and a red hat. Mot. to Revoke at 3. When police
11 executed a search warrant on Lay's home, they found clothes matching the clothes of one shooter
12 from the video. Id. at 5. The officers also found two firearms during their search, one of which
13 was found in the same room as the clothing. Id. The other firearm was found inside a safe that
14 contained Lay's personal identification information, including his passport, social security card,
15 and driver license. Id. at 4–5. Additionally, the government alleges that one of the weapons had
16 Lay's DNA on it and the other matched the shell casings found at the Boulevard Mall after the
17 shooting. Clearly, Lay will dispute that evidence. However, at this stage, the weight of the
18 evidence weighs against pretrial release.

19 **C. Lay's Personal Characteristics and Criminal History**

20 Lay has multiple arrests and convictions dating back to 1988. However, Lay's most
21 recent criminal conviction was in 2012 for misdemeanor DUI. Lay's last felony conviction
22 occurred in 1992, when he was convicted of murder with a deadly weapon. Mot. to Revoke at 6–
23 7. The Nevada Supreme Court vacated Lay's conviction in 2003, citing a Brady violation. Id. at
24 7. Rather than re-try Lay, the State offered him a time-served sentence in exchange for an Alford
25 plea, which Lay accepted. Id. Despite the Alford plea, Lay remained a felon and was prohibited
26 from possessing a firearm or ammunition. After 2012, Lay was not arrested again until after the
27 Boulevard Mall incident in 2019.

28 Lay's personal history and employment history show both stability and support of friends

1 and family. Resp. to Mot. to Vacate at 7. Lay purchased his home sixteen years ago. Id. He lives
2 there with his girlfriend of ten years. Id. Lay has held the same job for fourteen years. Id. Two of
3 Lay's supervisors attended both of Lay's detention hearings and have assured Lay that he will
4 continue his employment if released. Id. Besides the DUI convictions, Lay does not have a
5 history of substance abuse and does not have any drug-related convictions on his record. Last,
6 Lay has volunteered in his community. Id.

7 While it is true the Lay has been convicted of a felony and has multiple other arrests and
8 charges, those charges are dated. Lay has largely stayed out of trouble since 2012. Accordingly,
9 the Court finds that Lay's personal characteristics and lack of recent criminal history weigh
10 marginally in favor of pretrial release.

11 **D. Danger to the Community if Lay is Released**

12 Section 3142(g)'s final factor contemplates the danger Lay would pose to the public if he
13 were released pending trial. Before Lay's detention hearing, Pretrial Services prepared a report,
14 recommending that the magistrate judge deny pretrial release. Pretrial Services found that there
15 were no suitable conditions of release that would reasonably assure the public's safety if Lay
16 were released. Pretrial Services provided the report to this Court and has since reaffirmed its
17 recommendation that the Court deny pretrial release. It lists five reasons for denial: (1) the nature
18 of Lay's charges; (2) the prior arrests and convictions for violent crimes in Lay's criminal
19 history; (3) the likelihood that Lay will continue to engage in criminal activity; (4) the evidence
20 of Lay's gang ties; and (5) the active case against Lay.

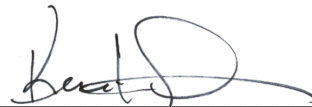
21 The Court has reviewed Pretrial Services' memo and agrees that no set of conditions
22 would reasonably assure the safety of the community if Lay is released. The night of the
23 Boulevard Mall incident, Lay carried a loaded firearm to the Casa Grill and Bar. Dozens, if not
24 hundreds, of people filtered through the restaurant that night, and the surveillance footage shows
25 many of these people walking to their cars within feet of where Lay and at least two other men
26 would exchange gunfire. Lay did not hesitate to fire his weapon, nor did he seek cover or attempt
27 to withdraw himself from the altercation despite being visibly restrained by another person.
28 Although it is unclear whether Lay fired first, he needed no time to draw the weapon from his

1 waistband before firing because he was already brandishing the firearm before the first shots
2 rang out. Then when Lay began shooting, he blindly discharged several rounds in the general
3 direction of the incoming fire without regard for the many bystanders in the parking lot and
4 garage. Any of Lay's stray rounds could have struck the people leaving the mall. All of this
5 happened despite Lay being a felon and being prohibited from owning or possessing a firearm or
6 ammunition in the first place.

7 Lay's decision to carry, brandish, and discharge a firearm despite being legally prohibited
8 from owning or possessing such weapons evince an utter disregard for the law, which begs the
9 question: if Lay could not be trusted to comply with the law then, how can the Court trust that
10 Lay will comply with the conditions of his pretrial release? The Court finds that it cannot. In
11 sum, three of the four § 3142(g) factors weigh against pretrial release. Lay's employment history
12 and lack of recent criminal history is the only factor supporting release. However, the violent and
13 dangerous nature of Lay's offense demonstrates that pretrial conditions could not reasonably
14 assure the public's safety if he were to be released. Therefore, the Court finds that the
15 government has shown by clear and convincing evidence that Lay does not qualify for pretrial
16 release under 18 U.S.C. § 3142(g).

17 **IV. Conclusion**

18 Accordingly, IT IS HEREBY ORDERED that the government's Emergency Motion for
19 Revocation of Magistrate Judge's Release Order (#14) is **GRANTED**.
20 Dated this 23rd day of August, 2019.

21
22 

23 Kent J. Dawson
24 United States District Judge
25
26
27
28